SUPREME COURT, U. S.

SEP 25 1969

JOHN F. DAVIS, CLERK

Nos. 285 and 532

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

THE FEDERAL BROADCASTING SYSTEM, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and FLOWER CITY TELEVISION CORPORATION, *Respondents.*

STAR TELEVISION, INC., COMMUNITY BROADCASTING, INC., CITIZENS TELEVISION CORPORATION, HERITAGE RADIO AND TELEVISION CO., INC., and MAIN BROADCASTING CO., INC., *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION and FLOWER CITY TELEVISION CORPORATION, *Respondents.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT FLOWER CITY TELEVISION CORPORATION IN OPPOSITION

THOMAS N. DOWD
HAROLD DAVID COHEN
J. LAURENT SCHARFF
PIERSON, BALL & DOWD
1000 Ring Building
Washington, D. C. 20036

Attorneys for Respondent Flower City Television Corporation

Washington, D. C. · THIEL PRESS 202 393-0625

INDEX

	Page
Questions Presented	1
Statement	2
Argument	8
Conclusion	17

CITATIONS

Cases:

Baltimore and Ohio Railroad Co. v. United States, 298 U.S. 349 (1936) 16

Colorado Radio Corp. v. Federal Communications Commission, 73 U.S.App.D.C. 225, 118 F.2d 24 (1941) 9

Federal Communications Commission v. WJR, The Goodwill Station, 337 U.S. 265 (1949) 10

Federal Trade Commission v. Mary Carter Paint Co. 382 U.S. 46 (1965) 11, 14

Fischer v. Federal Communications Commission, D.C. Cir. No. 21,942, decided July 14, 1969, slip opinion 9

National Labor Relations Board v. Seven-Up Bottling Co., 344 U.S. 344 (1953) 16

Norris & Hirshberg v. Securities and Exchange Commission, 82 U.S.App.D.C. 32, 163 F.2d 689 (1947) 10

Pinellas Broadcasting Co. v. Federal Communications Commission, 97 U.S.App.D.C. 236, 230 F.2d 204, cert. denied, 350 U.S. 1007 (1956) 11, 17

Sanders Bros. Radio Station v. Federal Communications Commission, 70 U.S.App.D.C. 297, 106 F.2d 321 (1969), rev'd, 309 U.S. 470 (1940) 10

Scripps-Howard Radio, Inc. v. Federal Communications Commission, 89 U.S.App.D.C. 13, 189 F.2d 677, cert. denied, 342 U.S. 830 (1951) 16

United States v. Abilene & Southern Ry. Co., 265 U.S. 274 (1924) 10

United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515 (1946) 16

Page

Statutes and Rules:

Communications Act of 1934, as amended, Section 4, 47 U.S.C. § 154 10

FCC Rules and Regulations, 47 C.F.R., Sections:

1.65 11

1.258 10

1.513 10

1.522 ..... 10, 11

Other:

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) 2, 3, 6, 8, 9, 11, 12, 13, 14, 15

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 285

THE FEDERAL BROADCASTING SYSTEM, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and FLOWER CITY TELEVISION CORPORATION, *Respondents.*

No. 532

STAR TELEVISION, INC., COMMUNITY BROADCASTING, INC., CITIZENS TELEVISION CORPORATION, HERITAGE RADIO AND TELEVISION CO., INC., and MAIN BROADCASTING CO., INC., *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION and FLOWER CITY TELEVISION CORPORATION, *Respondents.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT FLOWER CITY TELEVISION CORPORATION IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission acted reasonably in not considering an untimely and otherwise procedurally deficient offer by an applicant for a television station to dispose of its radio station in the same community in a last-minute attempt to enhance its comparative posture vis-a-vis the other applicants.

2. Whether the Commission, in comparing the merits and demerits of several competing applicants for a television license, acted reasonably in applying its *Policy Statement on Comparative Broadcast Hearings.*

3. Whether the basis for the Commission's choice of the winner in a comparative television case was adequately articulated in the Commission's decision?

STATEMENT

The petitions in Nos. 285 and 532 challenge the validity of a decision by the Federal Communications Commission in which Flower City Television Corporation (Flower City) was selected over eight other mutually-exclusive applicants for a construction permit to operate a television broadcast station on Channel 13 in Rochester, New York.

The competing applications[1] were filed in September and October 1961 and on November 21, 1961 were designated for hearing before a Hearing Examiner. Following 70 days of hearings between June and December 1962, the Hearing Examiner issued a 270-page Initial Decision on January 22, 1964 (9 F.C.C. 2d 264). The Examiner chose as a combined winner two of the applicants (RAETA and RTI) who proposed a share-time arrangement for using the channel.

The Examiner's conclusions covered the television needs and services in the Rochester area; the area familiarity of each of the applicant's principals; the integration of ownership and management proposed by each applicant; the

---

[1]Originally there were 12 applicants for the channel: the six petitioners (each referred to in abbreviated form hereinafter), respondent Flower City, Genesee Valley Television Co., Inc., Rochester Area Educational Television Association, Inc. (RAETA), Rochester Telecasters, Inc. (RTI), Rochester Broadcasting Corporation and Ivy Broadcasting Company. The latter two parties did not prosecute their applications. (Initial Decision, 9 F.C.C. 2d at 265 & n. 1.)

broadcast experience of each applicant's principals; the extent of diversification of control of mass media of communication as it related to each applicant; the past broadcast record of each applicant; the efforts of the applicants to determine broadcasting needs and to plan programs accordingly, as well as their proposed programming; and other comparative matters.

Exceptions to the Initial Decision were filed, followed by oral argument before the Commission *en banc* on November 2, 1964, at which time the parties again addressed themselves to the comparative merits of the several applications.

After hearing oral argument, the Commission concluded that the existing record did not contain sufficient evidence for the determination of whether a part-time applicant such as RTI would provide an effective outlet for a third competitive network service (which all of the applicants proposed to provide) and whether alternative means were available for broadcasting the type of educational programming proposed by RAETA. Accordingly, the record was reopened to adduce further evidence on these issues. At the same time, the Commission indicated that each applicant would be permitted to modify its programming proposal to reflect the evolving needs of Rochester. (FCC 65-403, released May 13, 1965.)

Following this remand to a hearing examiner, the parties entered into negotiations with RAETA, as a result of which RAETA dismissed its application with Commission approval and subsequently commenced operation of a full-time educational station on UHF Channel 21 in Rochester.

In an order released April 21, 1966 (FCC 66-347), the Commission set aside the remand order on the ground that no useful purpose would be served by further hearing on the matters specified, in view of RAETA's withdrawal and the Commission's adoption of the *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965), the latter having included guidelines for Commission con-

sideration of planning, preparation and proposed programming in comparative hearings. The April 21, 1966 order recited that it appeared to the Commission

> "that all matters of decisional significance in this proceeding are in the present record, that further hearings would serve no useful purpose and that it would be more conducive to the Commission's orderly processes for the Commission to decide this proceeding on the basis of the present record. . . ."

None of the applicants made any objection to this order of the Commission setting aside its earlier remand order. Nor did any of them make any move to supplement the record or the Initial Decision.[2]

Further oral argument was heard on May 22, 1967. At that time, in summarizing their positions on the comparative aspects of the case, the applicants reviewed the record and commented upon pending petitions for amendment of applications. The applicants also argued several procedural points (not raised by the instant petitions before the Court). In the course of a lengthy presentation at this oral argument (Tr. 9929-41), counsel for Federal stated (Tr. 9931, 9933) that if there was objection to the fact that Federal already owned a radio station in Rochester, it was willing to dispose of it on such terms and conditions as the Commission directed.[3]

On August 3, 1967, the Commission adopted the Decision which is the ultimate subject of the petitions before the Court (9 F.C.C. 2d 249, Pet. Appendix, p. 1a *et seq.*).

---

[2]Previously, on November 29, 1965, RTI had requested leave to amend its application to specify full-time operation and to alter its financial proposal.

[3]On March 8, 1968, while the eight appeals by losing applicants were already pending before the Court of Appeals for the District of Columbia Circuit, Federal tendered to the Commission an amendment to its application, stating that it was willing to dispose of its Rochester station.

After outlining the procedural history of the case, the Decision, in advance of a detailed comparative evaluation of the applicants, covered the following matters:

(a) It held that the Examiner's findings of fact were substantially accurate and complete, and they were adopted with modifications noted in the Decision and in an appendix of rulings on every exception taken by the parties. Because of the withdrawal of RAETA, the Commission stated that "the findings in this proceeding now warrant substantially different conclusions and a different ultimate result" (par.5).

(b) It stated that "each of the applicants has met its obligations" to be familiar with and ascertain the needs and interests of the area to be served, and that "variations in the respective program proposals are merely minor differences in the proportions of time allocated for varying types of programs" (par. 3).

(c) It held that the evidentiary showings of RAETA's specialized programming submitted pursuant to a subissue concerning unfulfilled programming needs—which subissue was added upon RAETA's petition for enlargement—were mooted by the dismissal of RAETA's application and the subsequent commencement of operations of educational station WXXI (par. 3, n. 3).

(d) It granted unopposed pending petitions for leave to amend the applications of Flower City, Star and Heritage to reflect already-effected changes regarding certain principals (par. 6(a), (b) (d)). Community and Flower City had in writing notified the Commission of effectuated changes regarding certain principals, and these facts were noted (par. 6(c) & n.5). Also, upon reconsideration of a previously denied petition for leave to amend, RTI was permitted to specify full-time operation without otherwise altering its comparative qualifications (par. 6(e)).

The Commission then undertook an evaluation of the applicants on the basis of several traditional comparative cri-

teria: diversification of the media of mass communication, participation in station operation by owners (otherwise known as integration of ownership and management) and past broadcast record, as well as other criteria (par. 7, 8, 10-12). No preference was awarded on proposed program service (preparation, staffing, program policies and proposals) because the Commission concluded that all of the applicants had met their obligations in this respect, and, in accordance with the 1965 *Policy Statement*, ordinary differences in judgment would not be compared (par. 9; see par. 3).

In its final weighing of preferences and demerits, the Commission stated:

> "13. We believe that the public interest would best be served by a grant to Flower. We conclude that no preferences are warranted with respect to the proposed program services and the efficient use of this television channel. * * * We find no significant difference among the applicants on diversification of control of mass communications media, except that, as pointed out above, Federal has other broadcast interests, including station WSAY in Rochester. The other important factors involved in this case are participation in station operation by owners and past record. On participation we have preferred Federal with Flower second, and on past record have given a preference to Community above all of the other applicants. We believe that Flower is to be preferred to Federal because of Federal's existing broadcast interests; we feel that the public's interest in a television station in Rochester which will provide an entirely new viewpoint in broadcasting not associated with any existing station is more important than the greater ownership participation which would be provided by Federal. We prefer Flower to Community because of Flower's superiority in the area of participation in station operation. This superiority arises from the experience factor. (We note that Community's participating stockholders also lack area familiarity.) We feel that

> Community's past record, while commendable, has not been shown to be so outstanding as to warrant substantial weight, since the past record is not that of Community, itself, but rather of a 15-per cent stockholder (and proposed general manager) who was a 50 per cent owner of the station whose record is involved. For the foregoing reasons we have determined to make the grant to Flower."

Commissioners Bartley and Johnson dissented in separate statements. Commissioner Bartley differed with the majority on the significance to the public interest of single ownership of AM-FM-TV broadcast stations in the same city. Thus, he would have assessed against Federal only a "slight" demerit on the factor of diversification of control, and he would have awarded it the overall preference by virtue of its superiority on the ownership-management integration factor. (Pet. Appendix, pp. 19a-21a.) Commissioner Johnson, on the other hand, agreed with the majority that Federal suffered a "substantial" detriment because of its ownership of other broadcast stations in the Rochester area. He stated, however, that while the Commission's choice of Flower City is "quite satisfactory," and his own preference is "not a strong one"—

> "Forced to vote for one of these nine applicants, I would choose Community Broadcasting, Inc. Community ranks well down the list in the integration factor. But, as the Commission notes, it deserves a preference for its past broadcast record."

(Pet. Appendix, pp. 21a-23a.) Neither of the dissenting Commissioners challenged the legality of the Commission's choice or manner of choice.

All of the unsuccessful applicants except Star filed petitions for reconsideration. In a Memorandum Opinion and Order adopted November 22, 1967 (10 F.C.C. 718, Pet. Appendix, p. 24a *et seq.*), the Commission adhered to and expanded upon its evaluation of the applicants and ultimate preference of Flower City under the comparative criteria (par. 2-4). It denied as untimely and unfair a post-Decision

petition by Citizens for leave to amend its application regarding the management participation by one of its stockholders (par. 7 n. 2), and it also explained that Community had been given no credit in the Decision for a late-filed promise of greater participation by one of its stockholders (*ibid.*).

The court of appeals on January 30, 1969 affirmed the Commission action. Judges Prettyman and Burger were of the opinion that the Commission had adequately reflected in its Decision the reasoning by which it reached a preference for Flower City on what turned out to be the critical factor of the owner's participation in the management of the station. They stated that "[a] reading of the detailed findings concerning the experience of each of the people involved shows clearly the grounds upon which the Commission made this finding" (Pet. Appendix, p. 36a). Judge Leventhal dissented on this point.

Neither the majority nor the minority opinion mentions Federal's claim of error based on its last-minute offers to dispose of its Rochester radio station, if such would help its case. Both opinions likewise rejected *sub silentio* the arguments made below by the other applicants that the Commission had violated its 1965 *Policy Statement on Comparative Broadcast Hearings*, and, further, that it should have given preferences to some applicants because of their proposed programming and ascertainment of community needs.

On April 1, 1969, petitions for rehearing and suggestions for rehearing *en banc* were denied by the court of appeals (Pet. Appendix, p. 51a).

ARGUMENT

The errors asserted in these petitions to have been committed below are not of the kind which warrant review by this Court. No important unsettled question of law is presented; and no conflict in decisions of lower courts is involved.

I.

Federal, the petitioner in No. 285, urges this Court to intercede because the Commission refused to regard a representation by Federal's counsel at final oral argument—to the effect that it would dispose of its radio station in Rochester if this was deemed an adverse factor—as eliminating a weakness which had been manifest in Federal's application for six years and which had formed an integral part of the other applicants' cases against Federal. Although this alleged error on the part of the Commission was also argued by Federal in the court below, it failed to elicit even a comment in either the majority or the dissenting opinion. The Commission's unwillingness to give any weight to Federal's belated and procedurally defective attempt to shore up its weak application was required by concern for due process to which the other applicants were entitled and, at the very least, represented a determination clearly within the administrative discretion of the Commission.

Federal was inexcusably untimely and otherwise deficient procedurally in the manner in which it sought to influence the Commission decision by an attorney's passing statements at oral argument. The applicants had finalized their proposals several years previously, and they had engaged in a protracted and complicated hearing on the basis of those proposals. "The Commission is not required to play games with applicants."[4]

Federal's contention that it had not previously been given an opportunity to amend its application in light of the July 1965 *Policy Statement* (Pet. Br., No. 285, p. 19 & n. 24)—even assuming *arguendo* that the latter effected a substantial change—is belied by the fact that, after the *Policy Statement* was issued and prior to the 1967 oral argument, Federal,

---

[4] Fischer v. Federal Communications Commission, D.C. Cir. No. 21,942, decided July 14, 1969, slip opinion, p. 7; *cf.* Colorado Radio Corp. v. Federal Communications Commission, 73 U.S. App. D.C. 225, 227, 118 F.2d 24, 26 (1941).

had almost two years in which to file a written petition for leave to amend its construction permit application pursuant to the Commission's Rules and Regulations (47 C.F.R. § 1.522(b)) and/or to supplement the closed hearing record (see 47 C.F.R. § 1.258) with its new proposal. Under either procedure, competing applicants would have had an opportunity to state their opposition to and cross-examine (or otherwise test) Federal's proposal.

Under well-established Commission practice, an attorney may not sign a license application or an amendment to an application for his client (47 C.F.R. § 1.513). Certainly, Federal counsel's attempt to accomplish such an amendment through his oral argument contravened the policy underlying that rule. In providing that "[t]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice" (Communications Act of 1934, as amended § 4(j), 47 U.S.C. § 154(j)), Congress "left largely to its [the Commission's] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate those ends." *Federal Communications Commission v. WJR, The Goodwill Station*, 337 U.S. 265, 282 (1949). Furthermore, oral argument is not a part of the evidentiary record to which, by due process considerations, the Commission was confined in making its findings and decision regarding the proposals of the applicants.[5]

Federal relies on a false premise when it states that the *Policy Statement* made such a substantial change in Commission policy to promote diversification of control of communications mass media that it was entitled to re-shape its

---

[5] United States v. Abilene & Southern Ry. Co., 265 U.S. 274, 288-89 (1924); Sanders Bros. Radio Station v. Federal Communications Commission, 70 U.S. App. D.C. 297, 302-03, 106 F.2d 321, 326-27 (1939), *rev'd on other grounds*, 309 U.S. 470 (1940); Norris & Hirshberg v. Securities and Exchange Commission, 82 U.S. App. D.C. 32, 36-37, 163 F.2d 689, 693-94 (1947).

case in light of that change. In point of fact, diversification had been one of the Commission's principal comparative criteria for many years before the *Policy Statement*. The Commission described the *Policy Statement* as "[a] general review of the criteria governing the disposition of comparative broadcast hearings. . ." (1 F.C.C. 2d at 393). "As in the past, we will consider both common control and less than controlling interests in other broadcast stations. . ." (1 F.C.C. 2d at 394). Further, the fact that the Commission from time to time may change its emphasis upon the various factors which it employs to find the public interest does not entitle an applicant to retry his case on the basis of the latest expression of views from the Commission.[6]

Federal is also in error in equating its proposal to divest itself of its conflicting broadcast interests with certain post-hearing changes of other applicants which were noted by the Commission in its Decision (Pet. Br. No. 285, pp. 20-21). All of the changes of the other applicants had been alredy effected (with two exceptions concerning Community and RTI, mentioned in the next sentence and footnote), *and* the Commission had been notified in writing pursuant to Commission regulations, either through a request for leave to amend an application (47 C.F.R. § 1.522(b)) or by notification of a significant change in information furnished in the application (47 C.F.R. § 1.65). The Comission rejected as untimely and unfair late-filed *proposals* by Citizens and Community, even though the proposals had been made in appropriate pleadings. (Pet. Appendix, p. 27 a, n.2).[7]

---

[6]See Federal Trade Commission v. Mary Carter Paint Co., 382 U.S. 46 (1965); Pinellas Broadcasting Co. v. Federal Communications Commission, 97 U.S.App.D.C. 236, 230 F.2d 204, *cert. denied*, 350 U.S. 1007 (1956).

[7]Even in granting RTI's 1965 petition to amend its application to specify full-time operation (instead of the share-time arrangement with RAETA, which had withdrawn), the Commission made clear that this change would not alter RTI's comparative qualifications (Pet. Appendix, pp. 7a-8a).

Since Federal did not attempt to introduce its proposal into evidence, or to tender it in a written pleading to the Commission—either before the Decision or before reconsideration thereof—the Commission cannot be faulted for not having given to Federal the "rational explanation" which it demands (Pet. Br., No. 285, p. 23).

II.

In No. 532, the petitioners seek to call into question the rationality of the Commission's comparative process. There were no differences within the Court below as to the validity of the Commission's interpretation of its *Policy Statement on Comparative Broadcast Hearings* in this particular case, and the Commission's interpretation of its *Statement* cannot be elevated to an issue of general importance as urged by petitioners.[8] Nor was there any denial of the principle urged here by petitioners— that the Commission, in a comparative television case, is required to give reasons or explanation for its conclusions. The point on which Judge Leventhal dissented concerned essentially the degree of explanation required of the Commission in the particular factual context in order to clarify the bases for its decision. The difference between Judges Prettyman and Burger, on the one hand, and Judge Leventhal, on the other, is that the majority thought the Commission's bases for choosing Flower City were sufficiently evident from a reading of the Commission's analytical paragraphs and the basic findings

---

[8]One of petitioners' charges in this respect—that the Commission deviated from its established policy, and specifically its 1965 *Policy Statement*, when it declined to rank the applicants on programming surveys and proposals (Pet. Br., No. 532, pp. 16-19)—was not raised before the court of appeals and therefore should not be considered here. Instead, in the court below, they argued unsuccessfully that the Commission, having designated hearing issues on those matters, had denied certain applicants due process by not awarding preferences thereon. (Brief for Appellants, D.C. Cir. Nos. 21,277, 21,541-47, March 18, 1968, pp. 47-55; compare *id.* at 55-70).

of fact which it adopted (Pet. Appendix, pp. 34a-36a), whereas Judge Leventhal was of the opinion that the analysis had not been articulated in sufficient depth by the Commission.[9] The degree of difference between the two views is not a matter calling for review by this Court.

While petitioners urge the Court to review the manner in which the Commission's *Policy Statement* was applied to the facts of this particular comparative proceeding, it may be noted that the legality of the *Statement* itself is not challenged. The Court is invited by petitioners to find that, even though the Commission purported to adhere to the *Statement*, it did not in fact do so in this case. A critical point, ignored by petitioners, is the function of the *Policy Statement*. They would apparently have the Commission give the *Policy Statement* a formulistic interpretation in applying the ownership-management criterion. The essence of the Commission's duty, however, is to weigh a number of factors, the significance of which are determined by the facts adduced in the particular proceeding.[10]

All seven members of the Commission at the time of the issuance of the *Policy Statement* gave notice in their several opinions that particular cases would require particularized treatment of the criteria. The majority's statement also

---

[9] Although Judge Leventhal could "discern the path by which the Commission disposed of the applicants other than Citizens and Community" (Pet. Appendix, p. 41a), he, unlike the court majority, did not believe that the Commission had clearly enough set forth the premises underlying its reasons for preferring Flower City over Citizens and Community.

[10] In adopting the *Policy Statement*, the Commission recognized that: "* * * The hearing and decision process is inherently complex, and the subject does not lend itself to precise categorization or to the clear making of precedent. The various factors cannot be assigned absolute values, some factors may be present in some cases and not in others, and the differences between applicants with respect to each factor are almost infinitely variable." (1 F.C.C. 2d at 393.)

recognized that there might be changes in Commission membership—as there have been—and in the views of the individual members (*ibid.*). Realistically, then, even a clear departure from the literal word of the *Policy Statement* would not necessarily constitute a change in basic policy.[11]

In the proceeding at bar, the Commission followed guidelines, but evaluated, as it must, the substance and meaningfulness of the relevant attributes of each applicant to determine which would be most likely to operate in the public interest. Petitioners are displeased with that evaluation, but they have not shown that it was an unreasonable one in the light of the *Policy Statement.*

The Commission has never indicated, as petitioners imply (Pet. Br., No. 532, p. 15), that owner-management integration is to be evaluated primarily in terms of the percentage of the company's stock owned by the managers.[12] The Commission concluded that "all of the applicants, with the

---

[11]The Court followed this reasoning in upholding a Federal Trade Commission finding of deceptive advertising even though the FTC's "Guides Against Deceptive Pricing" appeared to permit the kind of advertising in question. In that case, Federal Trade Commission v. Mary Carter Paint Co., 382 U.S. 46, 47-48 (1965), the Court stated:

> "These, of course, were guides, not fixed rules as such, and were designed to inform businessmen of the factors which guide Commission decision. Although Mary Carter seems to have attempted to tailor its offer to come within their terms, the Commission found that it failed; the offer complied in appearance only."

[12]Moreover, the percentages stated for petitioners Main and Community are twice the accurate figures, because they include stock owned by certain less-then-fulltime stockholders, contrary to the representation by petitioners (see Initial Decision, 9 F.C.C. 2d at 525-26). It is also a fact of record that Auchincloss, one of Flower City's fulltime managers, is a member of the Sibley family group which owns 20.83 percent of Flower City stock (Initial Decision, 9 F.C.C. 2d at 267), in addition to the 10 percent ownership of Larson, Flower City's other fulltime manager.

exception of Genesee and Heritage, proposed full-time participation by a substantial percentage of the stock ownership. . ." (Pet. Appendix, p. 9a).

All of the petitioners' other objections to the Commission's application of the *Policy Statement* on this factor (Pet. Br., No. 532, pp. 15-16) have already been answered in the Decision. The Commission preferred the past broadcast experience of Flower City's fulltime participating stockholders and decided that this experience was controlling, because the significance of the local residence subcriterion—on which Flower City was excelled by certain other applicants—was diminished by other positive characteristics possessed by Flower City (Pet. Appendix, pp. 9a-10a).[13]

Petitioners also charge the Commission with having failed to give preferences to certain applicants for ascertaining community needs and proposing programming to meet those needs (Pet. Br., No. 532, pp. 15-19). They insist that the Commission adopted a policy assigning importance to these factors and then proceeded in this case to ignore them. But in the *Policy Statement*, the Commission stated that "[d]ecisional significance will be accorded only to material and substantial differences between applicants' proposed program plans" (1 F.C.C. 2d at 397).[14] In this proceeding,

---

[13] In this context petitioners assert that the Commission "ignored the fact" that Community received a credit for its past broadcast record. The factor of past broadcast record was given separate consideration by the Commission (Pet. Appendix, pp. 10a-12a), and was weighed in the final evaluation of the applicants (Pet. Appendix, pp. 13a-14a).

[14] "The importance of program service is obvious. The feasibility of making a comparative evaluation is not so obvious. Hearings take considerable time and precisely formulated program plans may have to be changed not only in details but in substance, to take account of new conditions obtaining at the time the successful applicant commences operation. Thus, minor differences among applicants are apt to prove to be of no significance." 1 F.C.C. 2d at 397.

the Commission adopted the Hearing Examiner's extensive findings on the evidence of needs ascertainment and program proposals (Initial Decision, 9 F.C.C. 2d at 354-477) and concluded in its own decision "that each of the applicants has met its obligations in this respect and that variations in the respective program proposals are merely minor differences in the proportions of time allocated for varying types of programs" (Pet. Appendix, p. 3a). Petitioners make no showing that the Commission was wrong in this conclusion, which was peculiarly a matter for Commission discretion.

Petitioners also claim that the Commission failed to state "satisfactory reasons" for preferring the prior broadcast experience of Flower City's owner-managers (Pet. Br., No. 532, pp. 19-21). The Commission stated that it preferred Flower City because of "the broad broadcasting, and particularly television, experience of G. Bennett Larson, and of the somewhat lesser broadcast experience of Gordon Auchincloss II" (Pet. Appendix, pp. 9a-10a). This was obviously a qualitative judgment, amply supported by the Commission's basic findings of fact concerning all the principals of the parties (Initial Decision, 9 F.C.C. 2d at 266-353), as the court of appeals found with certitude (Pet. Appendix, p. 34a, 36a & n.7). On such a matter of administrative expertise and discretion, the Commission was not required to specify the weight given to the various items of evidence or to disclose the mental operations by which its conclusions was reached.[15]

The Commission's explanation for the overall preference of Flower City (next after Federal) on the owner-manager integration factor has been referred to above. Its Decision

---

[15] National Labor Relations Board v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953); United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 529 (1946); Baltimore and Ohio Railroad Co. v. United States, 298 U.S. 349, 359 (1936); Scripps-Howard Radio, Inc. v. Federal Communications Commission, 89 U.S.App.D.C. 13, 16-17, 189 F.2d 677, 680-81, *cert. denied*, 342 U.S. 830 (1951).

also quite adequately explains why Federal was subordinated to other applicants because of its ownership of a radio station in the same city and why Community's past broadcast record superiority was not "so outstanding as to warrant substantial weight" (Pet. Appendix, pp. 13a-14a).

In summary, the Commission applied its policies and criteria to the facts in an entirely reasonable manner and complied meticulously with all applicable procedural requirements. Thus, its choice of fully-qualified Flower City as the winner of the comparative proceeding was clearly within the realm of the Commission's discretion (*Pinellas Broadcasting Co. v. Federal Communications Commission*, 97 U.S. App. D.C. 236, 230 F.2d 204, *cert. denied*, 350 U.S. 1007 (1956), and this case presents no important question of federal law which is not already fully settled.

CONCLUSION

For the foregoing reasons, the petitions for a writ for certiorari should be denied.

Respectfully submitted,

THOMAS N. DOWD
HAROLD DAVID COHEN
J. LAURENT SCHARFF
Pierson, Ball & Dowd
1000 Ring Building
Washington, D.C. 20036
Attorneys for Respondent Flower City Television Corporation

September 1969.